Supreme Court, U.S.
FILED
JAN 11 1995
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No. 94-1056

In The

Supreme Court of the United States

October Term, 1994

JOHN W. MARTIN CONSTRUCTION COMPANY, INC., an Arizona Corporation; KALISPELL FEED AND GRAIN, INC., an Arizona Corporation; JOHN W. MARTIN, individually; PATRICIA M. MARTIN, individually,

Petitioners,

vs.

NORWEST BANK KALISPELL, N.A., a National Banking Corporation et al.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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DISCUSSION

I. The Questions Whether the Ninth Circuit Applied a Correct Standard of Review are Properly Before this Court.

Martin's Petition presents two closely related questions regarding the standard of review applied by the Ninth Circuit: (1) whether the standard, itself, is improper; and (2) whether the Court of Appeals erred in its application of the standard. Both questions address the relationship between the Seventh Amendment and the reviewing court's appropriate role in deciding a post-jury verdict motion for judgment as a matter of law. Contrary to the Bank's argument in its Brief In Opposition, these questions are properly before this Court.

In his Brief to the Ninth Circuit, Martin set forth the following standard of review:

> The verdict of the jury must be given considerable deference. This Court may reverse the District Court only if it finds that the evidence and all of its inferences, when considered as a whole and viewed in the light most favorable to Martin and KFG, can support only one reasonable conclusion, that being that the Bank is entitled to judgment notwithstanding the verdict. *Kern v. Levolor Lauritzen, supra* [899 F.2d 772, 775 (CA9 1990)].
>
> This Court will not re-weigh the evidence, nor may it select one inference over the inference chosen by the jury. *Cockrum v. Whitney*, 479 F.2d 84 (9th Cir. 1973). Where there is conflicting testimony on a material issue, this Court must leave the resolution of that conflict to the jury. The right to determine the credibility of a witness lies at the core of the jury's fact-finding function. *Bilbrey By Bilbrey v. Brown*, 738 F.2d 1462, 1468 (9th Cir. 1984).

Brief of Appellees, dated Oct. 20, 1993, at pp. 19-20. This is substantively the same standard as that applied by the district court. *See* Petition for Certiorari at A-12. Martin did not rely upon or brief the Ninth Circuit's substantial evidence standard of review under *Erickson v. Pierce County*, 960 F.2d 801, 804 (CA9), *cert. denied*, 113 S.Ct. 815 (1992).

Martin presented the appropriate standard of review to the Ninth Circuit, and did not invite it to apply the incorrect, substantial evidence standard. Thus, Martin properly afforded the court below the opportunity to avoid its error. Having done so, he may petition this Court to correct that error.[1]

Moreover, in petitioning for rehearing, Martin did take the Ninth Circuit to task for overstepping its proper role in reviewing the jury's verdict:

> If the members of this Court will review the concealments of material fact *ignored by the Panel*, the Court will be astounded that the verdict was reversed. (Respondent's Brief at App. 4-5 [emphasis added].)
>
> * * *
>
> This case hinged upon the credibility of the witnesses. The jury found the credibility of the Bank witnesses lacking, as did the trial judge who affirmed the jury's verdict. The credibility of the witnesses and the weight of the evidence *are issues for the jury to resolve. These issues are generally not the proper subject of appellate review.* [Emphasis added.] The jury's verdict, when based upon substantial evidence as it was here,

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[1] Martin could have petitioned for certiorari without first seeking rehearing below. Had he done so, the Bank could not credibly argue that Martin "acquiesced" in the substantial evidence standard of review.

must be given deference by this Court. (Respondent's Brief at App. 17.)

Though Martin did not *per se* articulate a challenge to the Ninth Circuit's substantial evidence standard in petitioning for rehearing, that question is "fairly included" within his challenge below to the panel's wrong approach and decision. *Cf.* SUPREME COURT RULE 14.1(a). This Court may, and should, grant Martin's petition for a writ of certiorari to review the important questions presented.

II. The Ninth Circuit's Standard of Review Was Not Correct.

Martin established in his petition for certiorari that federal courts apply differing and inconsistent standards of review in post-verdict motions for judgment as a matter of law. The *Erickson* substantial evidence test as applied here and in other recent cases in the Ninth Circuit is notably less deferential than the standards articulated by this Court in previous cases, and applied by other circuits.[2] Justice White, in referring to this unsettled issue, aptly noted that the " . . . disagreement among the Federal Courts of Appeal is of far more than academic interest." *Schwimmer v. Sony Corporation*, 459 U.S. 1007, 1009 (1982) (Opinion of White, J., respecting denial of certiorari). *See also* 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL § 2526 (1971).

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[2] The Bank suggests the denials of certiorari in *Erickson* and *Coddington v. Wabash Life Ins. Co.*, 1994 U.S. App. LEXIS 1926 (CA9 Jan. 26, 1994), *cert. denied* 63 U.S.L.W. 3262 (1994) support denial of certiorari here. (Brief in Opposition at 4, n. 6.) To the contrary, this Court's guidance is particularly appropriate in light of the Ninth Circuit's continuing and repeated application of an incorrect standard of review to reverse judgments entered on jury verdicts. *See also House of Stuart, Inc. v. Whirlpool Corp.*, 1994 U.S. App. LEXIS 22199 (CA9 Aug. 15, 1994).

The Bank does not point to any authorities from this Court, under Rule 50, which settle these issues. This is not surprising because no recent authorities exist.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), a case addressing the proper role of the trial court in deciding a summary judgment motion in a libel case, does not resolve the issue. First, even conceding parallels between the standards under Rule 56 and 50(a) (pre-submission motion), this Court should grant review to provide guidance on the appropriate deference to be accorded a jury's determination by a reviewing court on a post-verdict motion under Rule 50(b).

Second, the Ninth Circuit's substantial evidence test differs from the standard of review articulated in *Anderson*, even if that standard applies to a Rule 50(b) motion. The Bank argues, in essence, that it is a matter of mere semantics; the standards applied by the district court, the Ninth Circuit, and in *Anderson* are all substantively the same. (Brief in Opposition at 4-6.) This is not so.

As articulated, and as applied, the Ninth Circuit's standard begins by *questioning* and *examining* the validity of the jury's verdict: "We review . . . to determine if the plaintiff's claims were supported by substantial evidence. *Erickson v. Pierce County*, ... A directed verdict is proper when the evidence and its inferences cannot reasonably support a judgment in favor of the opposing party." (Petition for Certiorari at A-4). In other words, the reviewing court says, "Judgment as a matter of law will be *granted* unless the verdict is supported by substantial evidence."

In contrast, the standard briefed by Martin and applied by the district court begins by *accepting* and *deferring* to the jury's verdict: A motion for judgment as a matter of law will be granted only " 'if the evidence construed in the light most favorable to the nonmoving party permits *only one* reasonable conclusion as to the verdict and that conclusion is contrary to the jury's' and must [be denied] 'if reasonable minds could differ over

the verdict.' " (Petition for Certiorari at A-12 [citations omitted and emphasis added]). *Cf. Anderson v. Liberty Lobby, supra,* 477 U.S. at 250 ("If reasonable minds could differ . . . a verdict should not be directed."). In other words, the reviewing court says, "Judgment as a matter of law will be *denied* unless a jury could not reasonably have arrived at the verdict."

The Ninth Circuit's substantial evidence standard of review presumes the verdict is vulnerable. The proper standard presumes the verdict is valid, and will not be set aside if reasonable minds could differ over the verdict.

These are not matters of mere semantics, as the Bank argues. They are substantive and significant distinctions that directly impact litigants' Seventh Amendment rights. This Court should grant review to provide appropriate guidance and instruction to lower courts including, in particular, the Ninth Circuit.

CONCLUSION

This case presents important questions that warrant Supreme Court review. The petition for a writ of certiorari should be granted.

Respectfully submitted this 11th day of January 1995,

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